Muthoka & another (Suing as Administrators and Legal Representatives of the Estate of the Late Elijah Maina Wangui) v Ndirangu & another (Civil Appeal E079 of 2023) [2024] KEHC 13259 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13259 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E079 OF 2023

DKN MAGARE, J

OCTOBER 24, 2024

BETWEEN

STELLA NYAWIRA MUTHOKA ..... 1ST APPELLANT

BETH WANGUI MUTHIGANI ..... 2ND APPELLANT

SUING AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE ELIJAH MAINA WANGUI

AND

DANIEL NDERITU NDIRANGU ..... 1ST RESPONDENT

BEJAJO INVESTMENT LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and Decree of the lower court delivered on 6/3/2023 in Nyeri CMCC No. E336 of 2021 by Hon. E. Angima, SRM. The court dismissed the Appellants' suit.

2. The Memorandum of Appeal raises only one issue, that is, liability. The question this court will have to deal with is whether the Magistrate's Court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

3. In the Plaint dated 14/10/2021, the Plaintiff sought general damages under *Fatal Accidents Act* Cap 32 and *Law Reform Act*, Cap 26 of the Laws of Kenya and special damages of Ksh. 95,240/=.

4. The claim arose from the accident that allegedly occurred on 6/3/2021 when the deceased was riding motorcycle Registration No. KMEG 690B along Nyeri – Nyahururu road at Kanyagia area when the 1st Respondent drove the 2nd Respondent's motor vehicle Registration No. KCF 179G so negligently and collided with the motorcycle causing the deceased fatal injuries. The Appellants set out the particulars

of negligence on the part of the Respondent as well as the particulars of dependants of the deceased and special damages of Kshs. 95,240/-.

5. The Respondents entered appearance and filed defence denying the averments in the plaint and blaming the accident on the deceased. They mainly blamed the deceased for being in the middle of the road and not using the extreme left.

Evidence

6. PW1 was Stella Nyawira Muthoka. She relied on her witness statement dated 14/10/2021 and documents filed in court of the even date. On cross examination, it was her case that she was not at the scene of the accident. That the deceased was her husband and had reflector jacket when he left for work, that he used to earn Kshs. 20,000/= - 30,000/= per month from sale of scrap metals. It was her stated case that the driver was to blame for the accident.

7. PW2 was Constable Titus Mbaabu. He produced the police abstract and testified that the accident occurred on 6/3/2021 at around 1950h. It was his case that the deceased died when he was rushed to Mary Immaculate Hospital. That investigations were conducted, and that the deceased was riding from the Nyahururu direction while the driver was driving towards the Nyahururu direction.

8. He testified that the result of the investigation was that an inquest be done. He stated that he relied on the information from the driver and passengers in the Respondent's vehicle to find that the deceased was to blame. He further testified that the motor vehicle was hit to its left side and there was a head on collision.

9. On cross examination, he testified that the deceased was trying to overtake a lorry and the scene had a dotted yellow line. That the deceased would have avoided the accident and was to blame. He could of course not get the side of the deceased to tell his story.

10. On the part of the Defendants, they called DW1, the driver of the accident motor vehicle. He relied on his witness statement dated 22/2/2022. It was his testimony that the deceased was overtaking a lorry and he was bypassing the lorry. That the deceased suddenly came from behind the lorry and crossed to the far left and hit the motor vehicle on its left front tire and head lamp.

11. On cross examination, he testified that he was driving at 75-80 Km/hr. He saw the deceased about 3 meters away appearing from behind the lorry that he was overtaking. He further testified that he tried to avoid the motorcycle by holding emergency brakes and moving towards the yellow line but the deceased came from the white lane and rode back into the lane of the motor vehicle as a result of which there was a collision.

12. The lower court considered the case and dismissed the Plaintiffs' case for failure to prove liability against the defendants. The court also opined that if the plaintiff had proved liability, an award of Ksh. 150,000/- would be granted for damages for loss of expectation of life, Ksh. 50,000/- for pain and suffering, Ksh. 1,500,000/- for loss of dependency and Ksh. 34,850/- for special damages. The award of loss of dependency would be based on a global sum as opposed to multiplier approach. The court relied on *Albert Odawa v Gichimu Gichenju HCCA No. 15 of 2003*.

Submissions

13. The Appellants filed submissions dated 25/6/2024 and submitted that the lower court erred in dismissing the Plaintiffs' case. It was also submitted that the police officer who testified stated that an inquest would be necessary to discern blameworthiness and the lower court so erred in relying on the evidence of the police officer to the extent that the deceased was to blame for the accident. Reliance

was placed on the case of PAS vs George Onyango Orodi (2020) eKLR to submit that evidence based on an occurrence book which was not produced in court was a mere hearsay.

14. Therefore, it was submitted for the Appellants that the lower court was bound, based on the available materials to make a finding of 50-50 contribution as opposed to dismissing the case. Reliance was placed on the case of Postal Corporation of Kenya & Another vs Dickens Munayi (2014) eKLR.

15. On the other hand, the Respondents filed submissions dated 15/7/2024 and submitted that the learned magistrate correctly analyzed the facts and evidence before her and did not err in dismissing the Appellants' case. No authorities were cited.

Analysis

16. The issue is whether the learned magistrate erred in dismissing the Plaintiffs' case for reason of failure to prove liability on a balance of probabilities. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

17. The appellate court is not bound necessarily to accept the findings of fact by the subordinate court. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, Law JA stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. The law on the burden of proof is well settled. Sections 107 -109 of the *Evidence Act* places the burden of proof on a party who would fail if no evidence at all were given on either side, which in this case is the Respondent. The circumstances do not warrant a punishment on the said party. Sections 107 to 109 provides as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Who would fail if no evidence at all were given on either side.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

19. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

20. It follows that the initial burden of proof lies on the Plaintiff on the matters they assert and on the defendant on the matters they assert. The evidential burden can shift to the other side and crystalize if not rebutted. Therefore, the burden is not on the plaintiff, or the defendant, it is on the party who alleges. That is essentially the place of pleadings. Whereas parties tend to have generic particulars of negligence, it is incumbent upon a party raising specific issues to prove them. As such the burden of proving negligence is on the plaintiff while contributory negligence is on the defendant. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

21. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

22. The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not as Lord Nicholls of Birkenhead posited in Re H and Others (Minors) [1996] AC 563, 5 thus:

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it

is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

23. What is required of a civil case is a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

24. There must be cogent evidence tendered to prove either negligence or contributory negligence. The court dealt with the issue of contributory negligence in the case of *Cadama Builders Limited v Mutamba ((Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal E093 of 2021*) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment), Kasango J stated as follows: -

> " No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant's pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent's pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of Charterhouse Bank Limited (under statutory management) vs Frank Kamau (2016) eKLR, as follows:-
>
> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in KARUGI & ANOTHER V. KABIYA & 3 OTHERS (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

25. Section 35 of the *Evidence Act* covers what evidence is as follows: -

1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

   (a) if the maker of the statement either—

      (i) had personal knowledge of the matters dealt with by the statement; or

      (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

   (b) if the maker of the statement is called as a witness in the proceedings:

   Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

26. Evidence is as good as the source. In this case the police officer testified well that one vehicle was coming from Nyahururu and another from Nyeri. He and the defence witness testified that the motor cycle was overtaking a lorry. No numbers were given for that lorry. This is for one reason; it was not there. Such an important factor cannot miss in the defence. The defence raises only two questions; that of cycling in the middle of the lane and failing to keep to the left edge of the road.

27. The police evidence was based on a false assumption that the driver will tell the truth. However evidence produced, in terms of pictures and evidence elicited in cross examination tell a different story. The rider had a dent on the tank at the right side while the matatu had a dent in front going up to the windscreen. It is not possible that the rider was driving sideways. Further the driver could not explain why he was swerving to the right, when he stated that the deceased was riding on a yellow line. In such circumstances, a prudent driver swerves to the left, away from the rider.

28. Though stating that he was driving at 75-80 KPH, the impact on the vehicle tells a different story. He was at extremely high speed. The photographic evidence proved the respondent's negligence and not the rider.

29. This court thus notes that as pleaded by the Appellant in the Plaint, the facts of this case supported the application of the doctrine of res ipsa loquitor. The Appellants were duty bound to establish the facts, from which an inference of negligence can be made, in absence of a rebuttal. These facts are to speak for themselves. Res Ipsa Loquitor is thus a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In cases like this where one party is deceased and there are no eye witnesses it will be placing a humongous burden to show the exact cause of the accident. However, where it can be inferred that there was negligence in the circumstances of the case, the burden of disproving the negligence is on the party alleging that the facts do not speak

for themselves. The Court of Appeal, in the case of Margaret Waithera Maina v Michael K Kimaru [2015] eKLR) held as follows on res ipsa loquitur:

> " Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12th edition, appears this passage: Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine: I think that it is no more than an exotic although convenient; phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."

30. Although the Appellants pleaded res ipsa loquitor, it is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable. These sentiments were expressed by Hobhouse, LJ in the case of Ratcliffe v Plymouth & Tobay HA [1998] PIQR 170:

> " .....the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phase 'a prima facie case'. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out." Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of Nandwa v Kenya Kazi Ltd, Civil Appeal No. 91/1987 for the reason that evidence is not to be pleaded. Also see Bennet v Chemical Construction (GB) Ltd 3 All ER 822 where the Court emphasized that: It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable. "Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability."

31. In situations where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence, the doctrine is imported to require an explanation to be given. In the case of Sally Kibii & another v Francis Ogaro [2012] eKLR, Ibrahim J (as he then was) pronounced himself as follows:-

> " To my understanding, "res ipsa loquitor" would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See Bikwatirizo v Railway Corporation [1971] EA 82. To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause. This is a case of two cars colliding. What facts have been proved by the Plaintiff to presume negligence on the part of the defendant as against the other vehicle?

> Can I safely presume that the mere fact that the two cars being KAK 746 J and KAG 331 K collided, negligence was on the part of the defendant's case and not the other? The plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot simply be an assumption in the Plaintiff's case in this case. If the deceased was in a self-involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car. With respect, I disagree with the appellant's counsel that the burden of proof of occurrence of an accident shifted to the other side. I hold the view, that the defendant is only enjoined to rebut the presumption of res ipsa loquitor after the plaintiff has established a prima facie case by relying on the facts of an accident. It is after this that the court is called upon to evaluate the evidence and find if the inference of negligence should be drawn against the defendant."

32. In the instant case there was no eye witness to shed light on how the accident occurred. The police abstract on record showed that the accident was under investigation. The accident involved a motor cycle and a motor vehicle and from the evidence nothing attributes liability to the Respondent. There were admitted to be a dent on the right side of the motorcycle and the driver's side of the vehicle. The explanation given by the defendant does not add up. A vehicle finding itself faced with an unknown lorry being overtaken by a motor cycle, does not swerve to the right as that is reckless.

33. On the other hand, I note that there was contention about the helmet. The deceased was not wearing one as per the police officer, whom the Appellant called. The reflective jacket was shown to have been won. In any case the Respondent's driver was not attentive as he saw the deceased 3 metres to the occurrence of the accident as he drove at very high speed. It is not possible that the extent of damage shown on the vehicle and the impact could arise from a slow moving vehicle.

34. Further, if the driver swerved and managed to have an accident in the middle of the road around the yellow line, hitting the motor cycle obliquely, it is more probable than not that it is the Respondents who came into the path of the deceased's motorcycle.

35. Courts must be weary of evidence that is tendered without being pleaded. It is evidence that is not useful in deciding issues in controversy. It is irrelevant that a statement written a year later has the fictitious vehicle being overtaken. This is a factor that will ambush the other side, while looking at pleadings. Order 2 Rule 4 (1) provides as follows: -

> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

36. The question of overtaking another vehicle dangerously ought to have been pleaded. This is because, the Supreme Court, Court of Appeal and this court have for umpteenth time stated that before a case is proved, it must be pleaded. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in

consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

37. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

38. In my view, the court was entitled to base its analysis on circumstantial evidence in the absence of the eye witness or primary evidence of investigations such as sketch plan and photographs of the scene of accident. In the case of Embu Road Services V Riimi (1968) EA 22, the court held inter alia as doth;

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

39. There can be no liability without fault. However, where there is fault the court must take into consideration what is pleaded, what evidence is tendered, while giving preference to documentary evidence, including photographic evidence. In the case of Kiema Muthuku v Kenya Cargo Handling Services Ltd (1991) 2 KAR 258, the court of appeal posited as doth:

There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

40. Therefore, the court below erred in dismissing the Appellant's suit. The source of evidence tendered by the police was the Respondent. The court thus failed to analyze the entire evidential gamut before her and reach a proper conclusion. The appeal is therefore allowed. The decree of the lower court is set aside on liability and in lieu thereof, I enter liability for the Appellant at 70% against the Respondent and 30% contributory negligence against the deceased. I do not find any basis for entering 50:50 as the evidence does not point to that direction. In the comparative jurisprudence in the case of Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987 Theobalds J enunciated as follows; -

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

41. There is no appeal on quantum. In the circumstances, I shall adopt the damages as awarded by the court below as follows: -

a. Ksh. 150,000/- being damages for loss of expectation of life.

b. Ksh. 50,000/- damages for pain and suffering.

c. Ksh. 1,500,000/- for loss of dependency.

d. Ksh. 34,850/- for special damages.

Determination

42. In the upshot, I make the following orders:

a. The appeal is allowed. The judgment and decree of the lower court is set aside. In lieu thereof I enter judgment for the Appellants against the Respondents at 70% liability with the appellant bearing 30% contributory negligence.

b. In the circumstances, I shall adopt the damages as awarded by the court below as follows: -

i. Ksh. 150,000/- being damages for loss of expectation of life.

ii. Ksh. 50,000/- damages for pain and suffering.

iii. Ksh. 1,500,000/- for loss of dependency.

Subtotal Ksh. 1,700,000/=

Less 30% contribution Ksh. 510,000/=

Sum due Ksh. 1,190,000/=

iv. Add Ksh. 34,850/- for special damages

Total Ksh. 1,224,850/=

c. Special damages shall not be subject to contribution.

d. The Appellant shall have costs in the court below.

e. Costs of Ksh. 105,000/= to the Appellant for the appeal.

f. 30 days stay of execution.

g. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Munyori for the Appellants

No appearance for the Respondents

Court Assistant – Jedidah